Office - Supreme Court, U.S.
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MAY 29 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1636

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN PROUD, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner argues that the court of appeals erred in holding that the Hawaii recreational use statute, which immunizes private landowners from negligence suits for injuries occurring on lands they open to the public, also immunizes the United States from a suit under the Federal Tort Claims Act, for an injury that occurred in a national park located in Hawaii.

1. On March 30, 1979, petitioner's daughter struck her head on a submerged rock when diving into a fresh water pool in the Haleakala National Park in Hawaii (Pet. App. 1). Petitioner filed an administrative claim pursuant to 28 U.S.C. 2675 with the Department of the Interior for the injuries sustained by his daughter, alleging that the Park

Service was negligent in failing to warn divers at the Park of the submerged rocks. The administrative claim was denied (Pet. App. 12-13).

Petitioner then filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the District of Hawaii, alleging that the injuries were caused by the negligence of the United States. The government moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The government relied upon Hawaii's recreational use statute, Hawaii Rev. Stat. § 520 (1976), which provides that private owners of land owe no duty of care to keep their land safe or to post warnings for the benefit of those who use the land for recreation (Pet. App. 20-21).

The district court dismissed the complaint without prejudice (Pet. App. 11) to allow petitioner to amend his complaint to allege that his daughter's injuries were caused by willful or malicious conduct by employees of the United States; Hawaii's recreational use statute only immunizes the landowner from injuries caused by negligence. Petitioner declined to amend his complaint and instead moved for reconsideration. That motion was denied and final judgment was entered for the government (Pet. App. 9-10).

2. The court of appeals affirmed (Pet. App. 1-5). The court explained that the liability of the United States under the Federal Tort Claims Act is limited " 'to the same extent as a private individual under like circumstances.' " 28 U.S.C. 2674 (Pet. App. 2). The court then looked to Hawaii law to determine what liability a landowner incurs for injuries sustained on his property and concluded that a private landowner owes no duty of care to those who enter his land for recreational purposes. Hawaii Rev. Stat. § 520-3 (1976) (Pet. App. 3). Accordingly, the court of appeals concluded

that the United States owed no duty of care to petitioner for injuries sustained by his daughter within the national park. The court rejected as irrelevant petitioner's contention that the Hawaii legislature did not intend the recreational use immunity to extend to governmental defendants; instead, the court reasoned that "Congress — not the Hawaii Legislature — determined the tort liability of the United States" (Pet. App. 3).

3. Petitioner contends (Pet. 4-13) that the court of appeals erred in granting the United States a limited immunity for injuries occurring on federal lands, because the court disregarded the clear intent of the Hawaii legislature, which was to deny the recreational use immunity to lands owned by the government. The decision below is, however, a correct application of the "private person" limitation on the government's waiver of sovereign immunity.

The Federal Tort Claims Act confers jurisdiction on United States district courts over suits for personal injuries (28 U.S.C. 1346(b))

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

See also 28 U.S.C. 2674. Petitioner does not dispute, nor could he, that the Hawaii recreational use statute immunizes private landowners from tort liability under circumstances identical to this case. Accordingly, under the plain meaning of the statute, the United States is not liable for petitioner's daughter's injury. Indeed, every court of appeals that has considered the issue has concluded that the United States is entitled to the same immunity from suit as a private person enjoys under a state's recreational use statute. See

Mandel v. *United States*, 719 F.2d 963 (8th Cir. 1983) (Arkansas statute); *Morgan* v. *United States*, 709 F.2d 580 (9th Cir. 1983) (Washington statute); *Jones* v. *United States*, 693 F.2d 1299 (9th Cir. 1982) (Washington statute); *Simpson* v. *United States*, 652 F.2d 831 (9th Cir. 1981) (California statute); *Otteson* v. *United States*, 622 F.2d 516 (10th Cir. 1980) (Colorado statute); *Gard* v. *United States*, 594 F.2d 1230 (9th Cir.), cert. denied, 444 U.S. 866 (1979) (Nevada statute).

Nor is a different result justified because the Hawaii legislature did not intend to limit the liability of the United States under its recreational use statute. Congress did not waive the sovereign immunity of the United States to the extent allowed by the state legislature of the place where the injury occurred. Instead, Congress permitted tort suits against the federal government only to the extent the state permitted private individuals to be sued. See *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 319 (1957). Accordingly, the court of appeals was clearly correct in holding that the Hawaii statutory provision that would impose liability on government landowners was wholly irrelevant to the liability of the United States under the FTCA.[1]

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[1]Petitioner asserts (Pet. 6 n.3) that the conclusion that the United States is immune somehow requires the Court to declare the entire state recreational use statute unconstitutional. But this case raises no constitutional issues. The question of whether the United States is liable under 28 U.S.C. 1346(b) and 2674 is strictly a matter of the proper construction of a federal statute. Thus, the outcome of this case in no way undermines the State's ability to subject itself and its local governments to tort suits for injuries occurring on government lands.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

DOJ-1984-05